Commonwealth of Massachusetts

Appeals Court

Suffolk County **2017 Sitting**

No. 2017-P-0635

Commonwealth

v.

Mark J. Davis

On Appeal From A Judgment Of The
Central Division of the
Boston Municipal Court Of Suffolk County

Brief For
The Defendant/Appellant

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August 2017

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Issues Presented

1. Whether Mr. Davis's convictions for possession of substances found in a locked glove box of his vehicle should be suppressed where: (i) the use of a canine unit at the scene and the barracks indicated that the search was investigative and not administrative, (ii) as Mr. Davis was in the cruiser and then in booking when the search began it was not justified as a search incident to arrest, and (iii) the exigency inherent in a motor vehicle was no longer present when the vehicle was towed to the barracks?

2. Whether defense counsel's strategy of conceding guilt as to the possession counts was manifestly unreasonable where the evidence was not overwhelming?

STATEMENT OF THE CASE

The defendant/appellant, Mark Davis, appeals his convictions for two counts of possession of a class B substance, oxycodone and cocaine.

The events underlying this case occurred on the Massachusetts Turnpike ("Mass Pike") near Exit 18 on July 28, 2015. Mr. Davis was arraigned on six criminal and two civil charges in the Brighton Division of the Boston Municipal Court on July 29, 2015, docket number 1508CR0631. He pled not guilty to all charges, which included: (1) carrying a firearm without a license, in violation of G.L. c. 269, § 10(a); (2) possession of ammunition without an FID card, in violation of G.L. c. 269, § 10(h)(1); (3) speeding on the Mass Pike, in violation of 700 CMR § 7.08(6)(a); (4) following too close, in violation of 700 CMR § 7.08(15); (5) operating a motor vehicle under the influence of drugs (marijuana), in violation of G.L. c. 90, § 24(1)(a)(1); (6) possession with intent to distribute a class B substance (cocaine), subsequent offense, in violation of G.L. c. 94C, § 32A(b); (7) possession with intent to distribute a class B substance (oxycodone), subsequent offense, in violation of G.L. c. 94C, § 32A(b); and (8) possession with intent to

distribute class D substance (marijuana), in violation of G.L. c. 94C, § 32C(a). [R.A. 3-5][1]. On February 11, 2016 another complaint arising out of the same incident was issued out of Brighton District Court, Docket no. 1608CR000126-FR charging Mr. Davis with carrying a firearm without a license in violation of G.L. c. 269, § 10(a). [R.A. 23].

Mr. Davis's case was transferred to the Central Division of the Boston Municipal Court on December 10, 2015. The case entered the docket of BMC Central Division on December 14, 2015. [R.A. 11, 16].

Mr. Davis's trial counsel filed a motion to suppress evidence and statements on February 1, 2016. [R.A. 17, 31]. A hearing on the motion was held before judge Tracey Lyons on February 22, 2016. [R.A. 18; Tr. I, 3]. Mr. Davis filed a supplemental memorandum of law on February 29, 2016. [R.A. 19, 48]. Judge Lyons denied the motion in a written decision issued on March 28, 2016. [R.A. 19, 68]. A motion to reconsider the denial of the motion to suppress was filed by Mr. Davis's trial counsel on March 29, 2016. [R.A. 72].

[1] Mr. Davis cites to the transcripts of the motion hearing and the trial as [Tr. I-III, x]; and the record appendix as [R.A. X].

Judge Lyons denied this motion on the same date. [R.A. 19].

A jury trial was held in BMC Central before Judge Lyons on July 18 and July 19, 2016. Prior to trial, count 8 (possession with intent to distribute class D, marijuana) was dismissed at the request of the Commonwealth. Counts 6 and 7 had previously been reduced on August 4, 2015 (possession with intent to distribute oxycodone and cocaine) to exclude the subsequent offense portions of the offense. [R.A. 5]. On July 18, 2017 the Commonwealth reduced those charges to simple possession of a class B substance (cocaine and oxycodone). [R.A. 21; Tr. II, 30-31]. Docket no. 1608CR00126-FR was joined for the jury trial. [R.A. 21; Tr. II, 8].

Mr. Davis's trial counsel filed a motion for a required finding of not guilty at the close of the evidence, which Judge Lyons denied. [Tr. II, 231-33]. The jury found Mr. Davis not guilty of carrying a firearm without a license, possession of ammunition, and operating under the influence of marijuana. The jury found Mr. Davis guilty of both counts of possession of a class B substance, oxycodone and cocaine. Judge Lyons found Mr. Davis responsible for

both civil infractions (speeding and following too closely).

On July 19, 2016 Judge Lyons sentenced Mr. Davis to two and a half years of probation, with conditions to remain drug free, random drug testing, and maintaining his employment. [Tr. III, 76-77].

Mr. Davis's trial counsel timely filed a notice of appeal on July 20, 2016. [R.A. 11, 29, 91]. His appeal entered the docket of this Court on May 12, 2017.

STATEMENT OF FACTS

Mr. Davis challenges the lawfulness of the search of his vehicle both at the scene and the barracks. He also challenges trial counsel's strategy in conceding guilty to the possession charges.

A. Motion Hearing

The following facts are recited from the judge's findings. Due to the significant omissions and misstatements of many critical facts, Mr. Davis supplements the court's findings with facts not in dispute. [R.A. 68]. *Commonwealth v. Isaiah I,* 448 Mass. 334, 337 (2007)("[a]pellate courts may supplement a judge's finding of facts if the evidence is uncontroverted and undisputed and where the judge

explicitly or implicitly credited the witness's testimony"). He puts these additions in italics. The motion judge explicitly found the testimony of Major Daniel Risteen and Trooper Arthur Decouto credible. Troopers Daniel Crespi and Michael Lynch also testified at the hearing.

On July 28, 2015 at approximately 12:40 p.m., Major Risteen was traveling on the Mass Pike towards the State Police Barracks after attending a meeting *in Framingham. He was not in uniform and in an unmarked Ford Taurus*. [Tr. I, 23]. Major Risteen is a 30 year veteran of the State Police with training involving firearms, narcotics, and gangs. He testified he has smelled both fresh and burnt marijuana hundreds of times in the course of his training and experience on the job. Major Risteen stated he has made approximately fifty arrests for operating a motor vehicle while under the influence of marijuana. *He is not however certified as a drug recognition expert*. [Tr. I, 93]). On July 28, 2015, he observed an Infinity driving at a high rate of speed (70 mph) tailgating another vehicle. Major Risteen also observed the Infinity drive at a speed of 80 mph in a posted 55 mph zone. The Infinity tailgated a second

vehicle at a speed of 75 mph coming dangerously close to this vehicle. Major Risteen clocked the Infinity using his own vehicle for one mile. At exit 18 the speed limit is posted at 30 mph – the Infinity was traveling at 70 mph. *Major Risteen never observed the vehicle cross any lanes or swerve.* [Tr. I, 54]. He stopped the Infinity at the location of the tollbooths. He used the PA system to notify the driver to stop. Major Risteen stated there was a lot of traffic at this time of day. Major Risteen approached the driver's side and noticed three occupants. The driver, identified as Mark Davis, was asked to produce a license and registration, (which he did without event. [Tr. I, 27, 57]). Major Risteen detected a strong odor of burnt marijuana. He could also see small pieces of what appeared to be marijuana strewn about the backseat of the car and a steel screen marijuana grinder. *Contrary to the court's findings however, Major Risteen never testified that he made those observations while initially speaking with Mr. Davis. Those observations were not made until Mr. Davis was under arrest, in the back seat of the cruiser, and an inventory of the vehicle was being completed.* [Tr. I, 38]. Mr. Davis said they were "coming from New York

and one of his passengers had to be in Somerville by 1:00 p.m. and that is why he was moving fast." *Mr. Davis admitted to smoking marijuana a couple hours earlier*. [Tr. I, 28].

Major Risteen observed the following: Mr. Davis had red droopy glassy eyes, dry spit on the sides of his mouth, tongue was dry, licking his lips, speech – slow and lethargic. After making those observations Major Risteen called for back up. *Trooper Lynch responded fairly quickly.* [Tr. I, 28]. *Major Risteen informed Lynch what was going on and he reapproached the vehicle*. [Tr. I, 28]. The passengers appeared to be under the influence as well. They both readily admitted to smoking marijuana. Major Risteen stated the passengers "looked high" – their eyes were red, they had their heads tilted back with eyes closing, and appeared to be "sleepy". The smell of marijuana was from Mr. Davis's body and the motor vehicle. At this time Major Risteen asked Mr. Davis to step out of the car in order to check on his condition and walk to the back of the car. *While the judge found that Major Risteen stated field sobriety tests are not given in cases involving drugs, his actual testimony was that in his opinion, field sobriety tests are not a good*

indicator of impairment and he trusted his training and experience. [Tr. I, 38]. *Major Risteen called a drug recognition expert but none was available.* [Tr. I, 93]. He stated he monitored Mr. Davis's behavior and coordination, engaged him in conversation and noted the following: his coordination was slow, his head was bowing down, he had a hard time focusing – he asked him four times to take his hands out of his pockets, he was not able to follow simple instructions. At this time Major Risteen formed the opinion that the defendant was impaired and under the influence of marijuana. *Major Risteen informed Lynch that he was going to place Mr. Davis under arrest but he wanted another trooper there.* [Tr. I, 31]. *As the second Trooper, Arthur Decouto, arrived Mr. Davis was placed in his vehicle and arrested for operating a motor vehicle while under the influence of drugs.* [Tr. I, 31].

Major Risteen then focused on the passengers. He asked for the license and registrations because "he wanted to know if he was dealing with someone wanted for murder or it if was just somebody smoking marijuana. " [Tr. 74]. He found out they had been arrested and "had been around the block." [Tr. I, 74].

Even though no furtive movements were seen and he did not believe either of the passengers were armed, he called for back up because "they had been around the block. They weren't coming from church. You could tell by looking at these kids that he needed backup and he should be concerned for his safety." [Tr. I, 75-77]. Mr. Davis specifically requested that one of them drive the vehicle from the scene, but Risteen determined that neither of them could drive. He informed them they were not under arrest and could leave with the tow truck. [Tr. I, 32]. *Risteen opened the trunk and returned the passengers belongings not before frisking them. Notably absent from the judge's findings was that at some time before Major Risteen had called for a canine unit.* [Tr. I, 87]. *Trooper Blackwell arrived with his canine to further check the Infinity and check for drugs.* [Tr. I, 87].

At the request of Risteen and pursuant to Sate Police Motor Vehicle Inventory Policy (exhibit #1), Trooper Lynch began to inventory the car. *Mr. Davis was in the cruiser.* [Tr. I, 33, 106]. *Lynch picked up a black canvas bag and it was clear there was a gun inside.* [Tr. I, 107]. *As the bag was unlocked, Lynch opened and retrieved a firearm inside.* [Tr. I, 33, 69,

107]. The court found that Major Risteen had run Mr. Davis's information and learned he was a convicted felony and permitted to carry a firearm. *However, Major Risteen was clear that he did not have a mobile data system in his car and called dispatch and found out that Mr. Davis had been arrested before. He did not make any further inquiries.* [Tr. I, 66]. *He testified later that he found out the Mr. Davis had been arrested for felonies previously, but he was not sure if that was before or after the search of the vehicle.* [Tr. I, 87]. *Without being given* Miranda *warnings,* Major Risteen asked Mr. Davis if he had a license to carry — he did not reply. [Tr. I, 36]. Mr. Davis was transported to the barracks for booking. *At the scene, Major Risteen also found a plastic container containing three bags of marijuana. Only then did Major Risteen notice debris strewn all over both seats of the front and steel grinder containing marijuana.* [Tr. I, 38]. The car was towed to the barracks to complete the inventory process. Major Risteen testified that the car was pulled over to the side at the tollbooth and not a safe location to complete the inventory.

The court went on to find that "[i]nside the glove box was a Lugerbox with ammunition, 2 bags of cocaine, and 11 oxycontin. Major Risteen advised Mr. Davis of his Miranda rights to which he stated he understood. Major Risteen asked him if he wanted to say anything — Mr. Davis said "No I'm good — I don't want to say anything."

She continued to find that during the course of the booking Major Risteen came in and out of the area where Mr. Davis was located. At that time Mr. Davis voluntarily said he wanted to keep his two passengers out of trouble and admitted the gun belonged to him. Mr. Davis testified at the hearing and stated, "if there was anything illegal found the two guys had no recollection of it."

However, glaringly absent from the judge's findings are the dispositive facts of what occurred during the search of the vehicle at the barracks and the booking of Mr. Davis.

The following is an undisputed recollection of the testimony of Major Risteen, Troopers Lynch, Decouto and Crespi as to what occurred at the barracks.

At some point in time, Lynch and the canine unit performed an inventory of the vehicle at the barracks

and realized the glove compartment was locked. [Tr. I, 40, 87]. Lynch testified he believed that the canine unit examined the car first and discovered the contents of the glove compartment. [Tr. I, 108]. Trooper Crespi gave Major Risteen the keys found in Mr. Davis's pocket during Crespi's inventory of Mr. Davis's personal effects and used a key to open the glove box. [Tr. I, 40]. Inside the glove box, Risteen found two bags containing suspected cocaine and 11 oxycontin pills. However, according to Trooper Lynch, it was the canine unit that found the substances in the glove compartment and he was not sure how they got the glove compartment open. Lynch was standing in the back letting Blackwell and his canine do their work. [Tr. I, 113, 115].

There was no time frame given for when the search was performed at the barracks after the vehicle was towed. Major Risteen, however, did testify that it had been an hour or an hour and half since he had been in the barracks and had not spoken with Mr. Davis when he went to speak with him before he left. [Tr. I, 41].

While the court found that Major Risteen read Mr. Davis his rights, that was simply not his testimony. [Tr. I, 42]. It was Trooper Decouto who read Mr. Davis

his Miranda rights and had him sign the requisite Miranda form. [Tr. I, 10-11]. Trooper Crespi was also involved in the booking process. [Tr. I, 97]. He stated that Mr. Davis made it clear that he did not want to speak with police. Notably absent from the judge's findings is that Mr. Davis is that he invoked his right to silence. [Tr. I, 100]. At some point Risteen walked into the booking room and was informed by Crespi that Mr. Davis had invoked his right to silence. [Tr. I, 101-102]. Nonetheless, Major Risteen told Mr. Davis that he was leaving and that if he wanted to say anything now was his chance. [Tr. 42]. Mr. Davis said something along the lines of that he had found the gun in his grandfather's house four years ago and the other two knew nothing about it. [Tr. 44].

The State Police Inventory Policy was admitted as Exhibit 1. [R.A. 61]. The signed Miranda Rights Warning Form was admitted as Exhibit 2. [R.A. 64]. The Prisoner Property Form was admitted as Exhibit 3, [R. A. 65], and the Vehicle Inventory Report was admitted as Exhibit 4. [R.A. 66].

B. Trial

As Mr. Davis was found not guilty of all charges except possession of the substances found in the glove compartment, he recites the evidence relevant only to those charges.

From the outset, defense counsel told the jury to find Mr. Davis guilty of the possession charges. [Tr. II, 21, 62]. Specifically he said "I'm just going to be completely upfront with you right now, those drugs were Mr. Davis' drugs. You can go ahead and find him guilty of those drugs, no question." [Tr. II, 62]. Defense counsel again at closing stated that Mr. Davis possessed the things in the glove box, but then challenged whether the Commonwealth met its burden regarding the composition of the substances. [Tr. III, 9].

The evidence presented regarding the arrest and search of the vehicle was primarily the same as that presented at the hearing.

Substitute chemist, Andrea Wilson, testified at trial to the composition of the substances found in the glove compartment. [Tr. II, 172-193].[2] She stated that based on reviewing the data provided by the

[2] Mr. Davis does not challenge the Commonwealth's use of a substitute chemist. *Commonwealth v. Greinder*, 464 Mass. 580, 685-587 (2013); *Commonwealth v. Munoz*, 461 Mass. 126, 131-138 (2011).

testing chemist, she was of the opinion that the substances contained cocaine as well as oxycontin. [Tr. II, 181-185].

ARGUMENT

I. The Motion Court Erred In Denying Mr. Davis's Motion To Suppress Where The Troopers Violated His Rights Against Unreasonable Search And Seizure Where The Search: Impermissibly Exceeded The Scope Of An Inventory Search; Was Not Contemporaneous To His Arrest And The Search Of The Vehicle Was In The Barracks

Mr. Davis's Federal and State rights against unreasonable search and seizure were violated when State Troopers searched his glove compartment at the barracks without a warrant. *Florida v. Wells*, 495 U.S. 1, 3 (1990); *Commonwealth v. Eddington*, 459 Mass. 102, 108 (2011); *Commonwealth v. Alvarado*, 420 Mass. 542, 553 (1995). Not only was the impoundment of the vehicle improper, the subsequent search of the vehicle without a warrant was not justified by any exception to the warrant requirement. *See Arizona v. Gant*, 556 U.S. 332 (2009); *Commonwealth v. Perkins.* 465 Mass. 600, 604 (2013)(not permissible search incident to lawful arrest; *Commonwealth v. Agosto*, 428 Mass. 31, 34-35 n.5 (1998)(unreasonable delay invalidated search).

As discussed previously, the motion court's findings of fact omitted critical portions of the Troopers' credible and undisputed testimony. Accordingly, this Court is not bound to the bare bone

facts listed in her findings. *Commonwealth v. Bottari*, 395 Mass. 777, 780 (1985)("judge's findings of fact are binding in the absence of clear error"). In addition, the court's rulings of law omitted any analysis of lawfulness of the inventory search both at the scene and at the barracks. Specifically the court found:

> [T]he inventory search of the vehicle and the decision to impound the vehicle following the arrest of the defendant was reasonable on public safety grounds. Specifically, the vehicle was located on the side of the road after the tollbooth and both passengers appeared to be under the influence of drugs and not able to drive. The inventory of the vehicles contents adhered to the written State Police policy. *See Commonwealth v. Crowley-Chester*, 86 Mass. App. Ct. 804.
>
> The statements of the defendant were spontaneous as to smoking marijuana. The statement after the defendant had been given his Miranda warnings and acknowledged he understood were voluntary and therefore not suppressed.
>
> Accordingly, the motion is denied.

[R.A. 71].

Mr. Davis argues that contrary to the motion court's opinion, the decision to impound the vehicle was not reasonable and the search of the vehicle's contents was not constitutional. *Commonwealth v. Alvarado*, 420 Mass. 542, 544 (1995); *Commonwealth v. Bottari*, *supra* ("as this is a matter of constitutional

dimension, the judge's ultimate findings and rulings of law are open to reexamination by this court").

Accordingly, Mr. Davis's motion to suppress should have been allowed and the evidence found within the glove compartment of the vehicle should have been excluded. As the only evidence of possession of the class B substances was illegally found in the glove compartment, Mr. Davis's convictions should be vacated and the two complaints alleging possession of a class B substance, to wit: cocaine and oxycontin should be dismissed. *Wong Sun v. United States*, 371 U.S. 471 (1964); *Commonwealth v. Gomes*, 453 Mass. 506, 514 (2009).

a. As An Initial Matter, The Troopers Did Not Have Probable Cause To Arrest Mr. Davis For Operating A Motor Vehicle Under The Influence And Therefore No Constitutional Justification To Search The Infinity

Major Risteen failed to articulate sufficient observations that would indicate a person's ability to operate a motor vehicle had been impaired. Consuming marijuana is not a crime. *See Commonwealth v. Shellenberger*, 64 Mass. App. Ct. 70, 76 (2005)(ingestion of amphetamines without evidence of diminished capacity not indicative of impairment). Consuming marijuana and operating a vehicle is not a

crime. *See Commonwealth v. Daniel*, 464 Mass. 746, 756-757 (2013). *See also Commonwealth v. Cruz*, 459 Mass. 459, 476 (2011). Not until an officer can articulate specific observations that would allow a reasonable finder of fact to ascertain that the operator's ability to operate a motor vehicle has been impaired does it become a crime. Those facts are missing in the case at bar. *See Commonwealth v. Daniel*, 464 Mass. at 756-757 citing *Commonwealth v. Connolly*, 394 Mass. 169, 173 (1985)(no testimony that defendant's "'judgment, alertness, and ability to respond promptly and effectively to unexpected emergencies were diminished' by the consumption of marijuana."). *See generally Commonwealth v. Hasno*, 387 Mass. 169, 174 (1982) *quoting Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) ("[p]robable cause exists where the facts and circumstances within . . . the officers knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man with reasonable caution in belief that an offense has been or is being committed").

The facts that led to Major Risteen's opinion that Mr. Davis's ability to operate a motor vehicle was impaired was his: speeding, admission that he

smoked marijuana a couple hours earlier, red droopy eyes, and lethargy. *See Commonwealth v. Smola*, 69 Mass. App. Ct. 1113 (2007(unpublished decision pursuant to Rule 1:28)(stumbling and walking sideways indicted impairment due to marijuana). To the contrary, Major Risteen testified that Mr. Davis cooperated, understood his questions and answered them accordingly. Other than speeding there was no evidence of any erratic or impaired driving. [Tr. I, 52-54]. *See Commonwealth v. Daniel*, *supra* (no testimony that defendant's answers were inappropriate or uncooperative). Risteen's observation that Mr. Davis had a hard time keeping his hands out of his pockets is hardly of any note as it is perfectly reasonable to be nervous when speaking to a State Trooper on the side of a highway. *See Commonwealth v. Cruz*, 459 Mass. at 468 ("[i]t is common and not necessarily indicative of criminality to appear nervous during even a mundane encounter with police").

Importantly, Major Risteen was not a certified drug recognition expert and as such lacked the necessary and specific training needed to evaluate the presence of narcotics and their effects on a driver. *Commonwealth v. Ferola*, 72 Mass. App. Ct. 170, 172

(2008)(drug recognition expert is "able to evaluate the presence and classification of particular drugs, including narcotics and central nervous system depressants or stimulants, and their effects on a driver."). Accordingly, Mr. Davis's arrest was improper and any subsequent search of the vehicle unconstitutional.

b. The Inventory Search Was Improper Where Impoundment Was Unreasonable Where Mr. Davis Specifically Requested That One Of the Other Licensed Drivers Be Responsible For the Vehicle.

Even if Mr. Davis's arrest was proper, a fact he does not concede, the impoundment of the Infinity was not. "Because an inventory search is conducted without a warrant, the Commonwealth bears the burden of proving that the search was lawful." *Commonwealth v. Oliveira*, 474 Mass. 10, 13 (2016). The threshold question in determining whether an inventory search of a vehicle was proper is, "whether there [was] a reasonable and proper justification for the impoundment of the vehicle." *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976); *Commonwealth v. Oliveira*, *supra*.

A vehicle whose driver has been arrested may be seized

> to protect the vehicle and its contents from theft of vandalism; to protect the public from dangerous items that might be in the vehicle; to protect public safety where the vehicle, as parked creates a dangerous condition, or where the vehicle is parked on private property without the permission of the property owner as a result of a police stop, to spare the owner the burden of having to cause the vehicle to be towed.

Commonwealth v. Oliveira, *supra* (citations omitted). Here, while clearly the Infinity could not stay at the area around the toll booth, the Troopers should have allowed one of the licensed passengers to remove the vehicle. *Commonwealth v. Caceres*, 413 Mass. 749, 751 n.2 (1992)("if the owner of the vehicle is present and makes such a proposal [for an alternative disposition of the automobile], this principle [considering the alternate disposition] seems appropriate").

Major Risteen refused to let one of the passengers drive beause he formed the opinion they were "high" and "sleepy." [R.A. 69]. He formed the opinion that the passengers were not able to drive on even less factors than those present with Mr. Davis. Major Risteen never observed either passenger operate a motor vehicle. As such, he focused on the fact that they consumed marijuana a couple hours earlier and

they were lethargic. However, this alone does not indicate that someone is unable to drive.

As such, where Mr. Davis specifically asked to have one of the passengers drive his vehicle home, the subsequent impoundment was impermissible and thus the resulting inventory search unconstitutional. *Commonwealth v. Eddington*, 459 Mass. at 108 (impoundment of vehicle is threshold issue in determining lawfulness of inventory search).

c. Even If Impoundment Was Proper, The Search Was Investigative In Nature Where The Officer Enlisted The Assistance Of A Canine Unit And Finished "Inventoring" The Vehicle At The Barracks

The search of the vehicle was clearly not a permissible administrative inventory search. *See Commonwealth v. Alvarado*, 420 Mass. at 533. "Under both the Federal and State Constitutions, inventory searches must be done in accordance with standard police operating procedures, and under art. 14, those standard procedures must be in writing." *Commonwealth v. Eddington*, 459 Mass. at 108 n. 11.[3] "Law enforcement officers do not have discretion regarding what or where to search during an inventory search." *Commonwealth v. Alvarado*, *supra* 552 citing *Colorado v.*

[3] Mr. Davis does not dispute that the standards were in writing. [R.A. 61-63].

Bertine, 479 U.S. 367, 376 (1987). Inventory searches are not and cannot be investigatory in nature. *Commonwealth v. Alvarado*, 420 Mass. at 553. An inventory search becomes investigative through the use of a canine. *Id.*

Contrary to the motion court's sparse findings, this is exactly what occurred in the case at bar. While absent in the findings, Major Risteen summonsed a canine unit to search the vehicle at both the scene and the barracks. [Tr. I, 87]. This in and of itself removes the search out of the realm of permissible search into impermissible investigative search requiring either a warrant or an exception to the warrant requirement. *See Commonwealth v. Baptiste*, 65 Mass. App. Ct. 511, 516 (2006)("[t]he distinction between an inventory search and an investigatory search is found in the objective of each. The objective of an investigatory search is to gather evidence . . .").

Additionally, if this Court finds that use of the canine was proper, whether the search of the glove compartment was permissible depends on whether the key to the glove box was "available" for purposes of the State Police policy. The policy provides that "[t]he

following areas shall be inventoried . . . The glove compartment and trunk (unless they are locked and there is no key available). [R.A. 62]. However, the policy is unclear as to how much investigation is to occur to find such a key. As any ambiguity in the policy resolves in Mr. Davis's favor, the use of the key was impermissible. *See Commonwealth v. Vanya V.*, 75 Mass. App. Ct. 370 (2009).

Further, the manner in which the Troopers used the keys was impermissible where they were used in an investigatory manner. *See Commonwealth v. Blevines*, 438 Mass. 604, 607 (2003)(while seizure of keys appropriate, use as an investigatory tool unrelated to the crime for which the defendant was being arrested was not). By Trooper Crespi's admission, the keys to the vehicle were being held as personal property of Mr. Davis and not as evidence of the crime. [Tr. I, 98-99]. Accordingly, it is the manner in which they were used that was not permitted. *See Commonwealth v. Belvines*, 438 Mass. at 609.[4]

[4] This holding in *Blevines* was addressing the Commonwealth's argument that the search was permissible as a search incident to lawful arrest under G.L. c. 276, §1. Mr. Davis argues that while the use of the keys was under the color of an "inventory search," the argument is the same. However, even if this Court finds that the *Blevines* holding is not

As the search of Mr. Davis's vehicle as well as his glove compartment were investigative, it can only be upheld if it falls within an exception to the warrant requirement. Here, no such exception applies. Accordingly, the objects found in the car and specifically the substances in the glove compartment should have been suppressed. *See Commonwealth v. Alvarado*, *supra* at 553.

d. The Search Of The Vehicle At The Scene And The Barracks Did Not Qualify As A Search Incident To Lawful Arrest As It Was Not Contemporaneous And Mr. Davis Was Already In Custody

Under the both the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights warrantless searches and seizures are presumptively invalid. See *Katz v. United States,* 389 U.S. 347, 357 (1967); *Commonwealth v. Viriyahiranpaiboon,* 412 Mass. 224, 226 (1992). Where a warrantless search occurs, the Commonwealth bears the burden of proving it falls within one of the narrowly defined exceptions to the warrant

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relevant to an inventory search, Mr. Davis still argues that the scope of the inventory search was exceeded via the use of a canine unit and thus the search of the glove compartment would have to be upheld as either a search incident to lawful arrest under G.L. c. 276, §1 or an automobile exception. Accordingly, the holding in *Blevines* is relevant and the use of the keys violated the statute.

requirement. *Commonwealth v. Franklin*, 376 Mass. 885, 898 (1978).

One such exception is a search incident to lawful arrest.[5] The doctrine of search incident to arrest requires: (i) a lawful arrest, (ii) a search contemporaneous with the defendant's arrest and (iii) a search limited in purpose to fruits, instrumentalities, contraband and other evidence of the crime for which the arrest as been made . . . and removing weapons." *Commonwealth v. Alvarado*, 420 Mass. at 554; *Commonwealth v. Santiago*, 410 Mass. 737, 743 (1991). G. L. c. 276, §1.[6]

The purpose of allowing these warrantless searches is to "prevent an individual from destroying or concealing evidence of the crime for which the police have probable cause to arrest, or to prevent an

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[5] The motion court did not find that the impoundment and search of the vehicle was a search incident to a lawful arrest, but the issue was argued below. [R.A. 40-42, 51, 57 71].

[6] G.L. c. 276, § 1 states in relevant part: "A search conducted incident to an arrest may be made *only* for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evidence in criminal proceedings." (emphasis added).

individual from acquiring a weapon to resist arrest or facilitate escape. *Commonwealth v. Santiago*, *supra*. However, "[a] search of an automobile incident to arrest must be made "contemporaneous" with the arrest of any occupant of the vehicle." *Commonwealth v. Alvarado, supra* citing *New York v. Belton*, 453 U.S. 454, 460 (1981). In general, the search incident to a lawful arrest is confined to the physical person of the arrestee and any area within his lunge, reach, or grasp. *Chimel v. California,* 395 U.S. 752, 763 (1969); *Commonwealth v. Elizondo,* 428 Mass. 322, 324 (1998); *Commonwealth v. Alvarado*, 420 Mass. at 554.

Even if the arrest of Mr. Davis was proper, a point he has not conceded, the search of the vehicle at the scene was not conducted for the safety of the officers or performed to protect against the destruction of evidence. *See Commonwealth v. Santiago*, 410 Mass. at 743. The search of the vehicle at the highway was completed while Mr. Davis was in the cruiser and away from the vehicle. Accordingly, there was no risk of destruction of evidence or safety of the Troopers.

The search of the vehicle and the glove compartment at the barracks also did not fall under

this warrant exception where Mr. Davis was being booked and clearly posed no safety risk. In fact, other than the veiled attempt at categorizing the search of the glove box as an inventory search, the Commonwealth offered no justification for failing to obtain a warrant.

Importantly, an unreasonable delay will invalidate a lawful search incident to arrest. *New York v. Belton*, 453 U.S. at 460; *Commonwealth v. Agosto*, 428 Mass. at 34. "[W]e have not endorsed 'giving the police carte blanche to search without a warrant any time subsequent to a valid stop.'" *Commonwealth v. Agosto*, *supra* quoting *Commonwealth v. Markou*, 391 Mass. 27, 30-31 (1984). The Commonwealth presented no evidence as to when the search occurred at the barracks or how long it occurred. *Commonwealth v. Allen*, 76 Mass. App. Ct. 21, 24 (2009)(Commonwealth bears the burden of establishing the inventory search was conducted lawfully). The only time frame we have is Risteen's testimony and the Vehicle Inventory Form. Risteen specifically testifies:

> I drove to the E-4 barracks. Mr. Davis was there; he had been transported there. He was in booking. I started to do my paperwork, and I was intermittently involved in my paperwork with, you know a third, you know I was on the phone for awhile with other

> business within the barracks, so I was intermittently going from my reports, to the troopers, that were doing the inventory, to my other business . . . At one point in time, Trooper Lynch, Trooper Blackwell, were doing the inventory of the vehicle at the barracks, realized that the glove compartment was locked, and I recall that Mr. Davis had the key to the Infinity in his pocket. So I went to booking. Trooper Crespi gave me the key from Davis's pocket.

[Tr. I, 40]. Risteen also testified that he had been at the station for over an hour and had not seen or spoken to Mr. Davis before he went in to retrieve Mr. Davis's statement. [Tr. I, 42]. The Vehicle Inventory Report gives a time of 1400. However, that is still a little less than an hour and a half after the initial stop of Mr. Davis and not indicative of when the search began. [R. A. 66]. Accordingly, without a definitive time frame of when the search was commenced, the Commonwealth has not satisfied its burden that search was contemporaneous to Mr. Davis's arrest. *Commonwealth v. Alvarado,* 420 Mass. at 554 (search two hours after towed was not contemporaneous). Accordingly, the search cannot be upheld as a search incident to lawful arrest.

e. Finally, The Search Does Not Qualify As A Lawful Search Pursuant To The Automobile Exception Where Once The Vehicle Was Towed To The Barracks Any Exigency That Existed At The Scene Was Gone

Another exception to the warrant requirement is what is called the "automobile exception." Under this

justification, a warrant is not required when "police have probable cause to believe that an automobile contains contraband or evidence of a crime and they are faced with exigent circumstances, making a warrant impracticable." *Commonwealth v. Alvarado, supra* at 554 citing *Chambers v. Maroney*, 399 U.S. 42, 90 (1970). It is the Commonwealth's burden to prove both exigency and probable.

While a firearm was found in the trunk, there was no reason to believe that instrumentalities of the crime of possession of a firearm or operating a motor vehicle under the influence of marijuana would be found in the glove compartment. However, even if probable cause did exist, the justification for the warrantless search is absent where the exigency found in searching automobiles on the highway no longer exists as the vehicle is at police barracks. "It is not the existence of probable cause itself that justifies an exception to the warrant requirement," it is the inherent mobility of a vehicle that justifies a warrantless search at the time of the stop. *Commonwealth v. Agosto*, *supra* at 34. The Commonwealth cannot give any justification for not obtaining a warrant before searching the vehicle with a trained

canine unit. *See Commonwealth v. Alvarado*, 420 Mass. at 554.

As such, the evidence found in the glove compartment should have been suppressed. As that was the only evidence of Mr. Davis's guilt as to the possession charges, his convictions must be vacated and the complaints dismissed.

II. Lastly, Counsel Was Ineffective For Telling The Jury To Find Mr. Davis Guilty Of The Only Charges Of Which They Convicted Where The Decision Was Manifestly Unreasonable

It was manifestly unreasonable for defense counsel to tell the jury from the outset of trial to find Mr. Davis guilty of possession of the alleged Class B substances. The evidence of guilt was not overwhelming and Mr. Davis was entitled to the opportunity to refute the Commonwealth's suggestion that he was guilty of those charges. Accordingly, Mr. Davis is entitled to a new trial.

A defendant's Sixth Amendment and Article Twelve right to constitutionally effective counsel is violated if counsel's performance falls "measurably below that which might be expected of an ordinary fallible lawyer," which behavior "likely deprived the defendant of an otherwise available, substantial ground of defence." *Commonwealth v. Butler*, 464 Mass.

706, 709 (2013), quoting *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). In order to prove the second prong of the *Saferian* test, the defendant must demonstrate, "that better work might have accomplished something material for the defense." *Commonwealth v. Satterfield*, 373 Mass. 109, 115 (1977). *See Lockhart v. Fretwell,* 596 U.S. 364, 369-370 (1993); *Kimmelman v. Morrison*, 477 U.S. 365, 373-375 (1986); *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The defendant acknowledges that only in exceptional situations does a reviewing court resolve an ineffective assistance of counsel claim on direct appeal. However, if the "factual basis of the ineffective assistance claim appears indisputable on the trial record," the reviewing court may resolve the issue. *Commonwealth v. Livingston,* 70 Mass. App. Ct. 745, 748 (2007).

In his opening, defense counsel stated, "I'm going to be completely upfront with you right now, those drugs were Mr. Davis' drugs, no question. They were in his car in a locked glove box. He had the key to the glove box, his drugs." [Tr. II, 62]. From the outset, defense counsel conceded the fact that not only was Mr. Davis in possession of what was found in

the glove compartment but also that what was found in the glove compartment was drugs.

This was manifestly unreasonable where defense counsel further conceded possession and then changed tactics by arguing that the Commonwealth failed to meet their burden that the substances were a class B due to a substitute chemist testifying as to her opinion of the composition of the substances. In closing, defense counsel said

> So I told you before and I'll say it again. What was in that glove box was under Mr. Davis's control. It was under his lock and key. I'm not asking you to decide it wasn't his. And if you understand what the chemist said — if you feel like after her testimony you can conclude beyond a reasonable doubt that she — the her conclusion that those things were drugs is correct then go ahead. Find him guilty of the drugs.

[Tr. III, 20]. Mr. Davis acknowledges that in certain circumstances it is not a manifestly unreasonable trial strategy to admit guilt to the lesser offense in an effort to obtain a not guilty verdict on the more serious charges. *See Commonwealth v. Stoute*, 10 Mass. App. Ct. 932, 933 (1980). However, in this specific circumstance, where defense counsel conceded that the substances were drugs in his opening statement and then changed his trial strategy at a later date and challenged the opinion of the

Commonwealth's expert, that was a manifestly unreasonable decision. The evidence that the substances found in the glove compartment were cocaine and oxycontin was not overwhelming. *Compare Commonwealth v. Durakowski*, 58 Mass. App. Ct. 92, 94 (2003)(not manifestly unreasonable where evidence against defense was strong). As such, a proclamation of guilt to these charges was ineffective. Accordingly, Mr. Davis asks that his convictions be vacated and he be granted a new trial.

III. Conclusion

Based on the authorities cited and the reasons aforesaid, Mr. Davis requests that the judgment be reversed and the indictments dismissed or that he be granted a new trial.

Respectfully submitted,
Mark Davis

By his attorney,

/s/ MarySita Miles

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Commonwealth

v.

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Addendum

Massachusetts General Laws
Part I: Administration Of The Government
Title XV: Regulation of Trade
Chapter 94C:Controlled Substances Act
Section 32A: Class B Controlled Substances; Unlawful Manufacture; Distribution; Dispensing Or Possession With Intent To Manufacture, etc.; Eligibility For Parole

Section 32A. (a).

Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a controlled substance in Class B of section thirty-one shall be punished by imprisonment in the state prison for not more than ten years, or in a jail or house of correction for not more than two and one-half years, or by a fine of not less than one thousand nor more than ten thousand dollars, or both such fine and imprisonment.

69 Mass.App.Ct. 1113
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

COMMONWEALTH,
v.
Paul M. SMOLA.

No. 06–P–1165.
|
July 27, 2007.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The trial evidence showed that late on the afternoon of Thursday, August 25, 2005, State Police Trooper Luiz DeJesus was driving his cruiser eastbound on the Massachusetts Turnpike in the town of Becket, about eighteen miles east of the New York border, when he observed an eighteen-wheel tank truck, also eastbound, displaying a "HAZMAT" marker and trailing "a big white [gas] cloud about fifty feet high" from a leak somewhere at the back. (Tr. 3–4) DeJesus had first noticed the cloud about a mile before he came upon the tanker. As he drew closer, he saw that the cloud surrounded the truck and rose high above it. (RA 5)

Activating his emergency lights, DeJesus attempted to get the driver's attention. (Tr. 5) His attempt was unsuccessful so, after about one-half mile, he turned on his siren. (Tr. 5) When the combination of lights and siren failed to alert the driver to his presence, DeJesus pulled alongside the truck's cab and motioned to the driver to pull over. (Tr. 6) At this point, the driver, who turned out to be the defendant, complied. (Tr. 6)

After pulling to the side, the defendant immediately stepped out of the cab. Upon observing the leak, he said something to the effect that a valve must have come loose or he had not secured it properly after taking on a load of oxygen in New York. (Tr. 6) He secured the valve, stopping the leak and its attendant cloud. (Tr. 6) As the defendant walked from the cab to the rear of the tank where the valve was located, however, DeJesus, who had worked for more than five years as a narcotics adviser to the Colombian military (Tr. 4), noticed that he was

> "kind of stumbling, he wasn't walking straight; we call it kind of walking like a crab kin[d] of sideways a little bit. He appeared a little agitated, his eyes were bloodshot red, appeared a little bit dazed. As soon as he closed the valve he walked over to me and I could detect a strong smell that I recognized from years dealing with narcotic[s] as marijuana."

(Tr. 7)

Making no comment about what he had seen or smelled, DeJesus asked the defendant for his license and registration. (Tr. 8) As the defendant walked back to the cab to retrieve the documents, DeJesus again noticed that he was weaving and unsteady on his feet. (Tr. 8) After the defendant produced the documents DeJesus had requested the trooper arrested him for operating a motor vehicle while under the influence of drugs, advised him of his Miranda rights and asked how much marijuana he had smoked that day. (Tr. 8) Although he at first denied smoking any marijuana, the defendant asked whether there was "something we can do about this; this will ruin my life." (Tr. 8) A subsequent search of the truck's cab revealed not only a "very strong smell of marijuana" but a backpack containing "a large plastic bag and a small plastic bag" filled with what turned out to be marijuana. (Tr. 9, 11–12) The backpack also contained personal documents tied to the defendant. (Tr. 9)

***2** At trial, DeJesus also testified that the defendant's eighteen-wheeler never appeared to swerve or operate erratically (Tr. 25–28, 32–33) and that it had stayed within the speed limit. (Tr. 32) The truck appeared at all times to be under the defendant's control and DeJesus' sole reason for stopping the vehicle was to have the defendant close the leaking valve. (Tr. 28, 39) DeJesus administered no field sobriety tests (Tr. 40–43) and, despite his extensive narcotics experience, was unable to tell from the odor of marijuana how many cigarettes a person may have consumed during a given period or when the person smoked the marijuana. (Tr. 38–39) The defendant's speech was not slurred (Tr. 45), and the

defendant was cooperative at all times after he stopped the truck. (Tr. 45–46)

After the jury-waived trial, the judge found the defendant guilty of operating a motor vehicle while under the influence of marijuana, G.L. c. 90, § 24(1)(*a*)(1), and possession of marijuana, G.L. c. 94C, § 34.[1] Rejecting the defendant's request for diversion pursuant to G.L. c. 90, § 24D, the judge made written findings and sentenced the defendant on the vehicular charge to ninety days' incarceration in a house of correction, suspended with probation for one year. Subsequently, the judge denied so much of the defendant's motion to revise and revoke as pertained to that sentence.

1 The defendant's appeal does not challenge the latter conviction.

In his appeal, the defendant contends that there was no evidence of the amount of marijuana in his system and, given the absence of any expert testimony, no evidence of the amount of marijuana consumption necessary to affect one's ability to drive a vehicle safely. Consequently, he claims, there was insufficient evidence to support his conviction for violation of § 24(1)(*a*) (1). The defendant also argues that the judge abused his discretion by failing to sentence him under the provisions of G.L. c. 90, § 24D. We affirm.

There is no question that G.L. c. 90, § 24(1)(*a*)(1) prohibits operation of a motor vehicle while under the influence of marijuana. There is also no question that such a conviction under the statute requires the Commonwealth to prove "beyond a reasonable doubt that the defendant's consumption of [marijuana] diminished the defendant's *ability* to operate a motor vehicle safely. The Commonwealth need not prove that the defendant *actually drove* in an unsafe or erratic manner, but it must prove a diminished *capacity* to operate safely." *Commonwealth v. Connolly,* 394 Mass. 169, 173 (1985) (emphasis original). See *Commonwealth v. Reynolds,* 67 Mass.App.Ct. 215, 217–218 (2006). The Commonwealth may meet its burden through circumstantial evidence. See *id.* at 218. See also *Commonwealth v. Cromwell,* 56 Mass.App.Ct. 436, 438 (2002); *Commonwealth v. Johnson,* 59 Mass.App.Ct. 164, 172 (2003). In this case, it did. Viewed in the light most favorable to the Commonwealth, see *Commonwealth v. Latimore,* 378 Mass. 671, 677 (1979), the evidence reveals (1) that the defendant failed to notice that the truck he was driving was emitting a large white cloud of gas visible a mile away, (2) that the defendant failed to notice either the activated lights or the siren of DeJesus' cruiser, (3) that both he and the cab of his truck reeked of marijuana, (4) that a supply of marijuana was within his reach inside the truck's cab, (5) that he was unsteady on his feet, (6) that his pupils were dilated, and (7) that his eyes were bloodshot. That evidence was sufficient to support a conclusion, beyond a reasonable doubt, that the defendant had ingested marijuana to a degree that had diminished his capacity to operate his tank truck safely.

***3** *Commonwealth v. Shellenberger,* 64 Mass.App.Ct. 70, 76 (2005), on which the defendant places principal reliance, is not to the contrary. There we stated that admission of evidence that amphetamines were found in the system of a driver charged with motor vehicle homicide by negligent operation, G.L. c. 90, § 24G(*b*), "required, at a minimum, (1) reliable evidence as to the amount or concentration of the drug in the defendant's system; and (2) expert testimony indicating that the concentration of the drug in the defendant's system would impair her ability to operate a motor vehicle." *Shellenberger, supra.* In that case, though, there was absolutely no evidence of the defendant's drug-induced diminished capacity. Instead, the Commonwealth's case centered on a theory that she had been driving too fast on a slick road. Evidence that an unspecified amount of amphetamines was in her system some time after the accident was admitted through the testimony of an expert-witness physician whom the Commonwealth had called to testify about the victim's condition and cause of death. *Id.* at 71–74. Under those circumstances, admission of the evidence was totally footless and improper. *Id.* at 75–77. DeJesus' observations in this case create a record very different from that present in *Shellenberger.*[2]

2 *Commonwealth v. Kirkpatrick,* 423 Mass. 436, 447–448 (1996), the other opinion on which the defendant places heavy reliance, has very little to do with this case, for it focused on the question whether jurors can be expected to have common knowledge of the likelihood that sexual intercourse with a person infected by specific sexually transmitted diseases will result in transmission.

Finally, we conclude that the judge did not abuse his discretion by denying the defendant a disposition pursuant to G.L. c. 90, § 24D. Although the defendant was

eligible for a disposition under the statute, the judge made the findings of fact that the statute requires and concluded that the facts of the offense were "particularly egregious" because the defendant was driving a tank truck loaded with hazardous materials on a major highway while under the influence of marijuana and because of the obvious potential for dramatic harm to the public the defendant's conduct threatened. (RA 5–6)

Judgment affirmed.

Order denying motion to revise and revoke sentence on charge of operating a motor vehicle while under the influence of marijuana affirmed.

All Citations

69 Mass.App.Ct. 1113, 870 N.E.2d 676 (Table), 2007 WL 2163991

Commonwealth of Massachusetts

Appeals Court

Suffolk County **2017 Sitting**

No. 2017-P-0635

Commonwealth

v.

Mark J. Davis

On Appeal From A Judgment Of The
Central Division of the
Boston Municipal Court Of Suffolk County

Record Appendix
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August 2017

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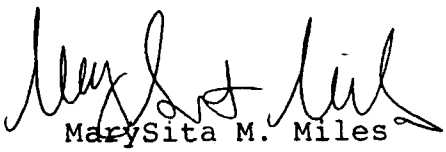
Certification

I certify that this brief complies with the relevant rules of court pertaining to the preparation and filing of briefs. Those rules include Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(f) (reproduction of statutes, rules and regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).



MarySita M. Miles

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, SS. No. 2017-P-0635

COMMONWEALTH OF MASSACHUSETTS

V.

MARK J. DAVIS

Certificate of Service

I certify that on August 4, 2017 I served one (1) cop1 of the attached brief and record appendix via e-file, to:

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